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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ROBERT HENRY JACKSON, Defendant and Appellant.	C040556 (Super. Ct. No. 98F08958)

A jury convicted defendant Robert Henry Jackson of possessing marijuana in prison (Pen. Code, § 4573.6); further section references are to the Penal Code) and found that he had two prior serious felony convictions (§§ 667, subds. (b)-(i), 1170.12) for murder (§ 187) and attempted robbery (§§ 211, 664). He was sentenced to a term of 25 years to life, to be served consecutively to the prison term he was then serving for the murder and attempted robbery.

On appeal, defendant contends (1) the trial court erred in instructing the jury with CALJIC Nos. 17.41.1, 1.00 and 2.90, and (2) his sentence constitutes cruel and unusual punishment. We shall affirm the judgment.

FACTS

Defendant, an inmate at California State Prison, Sacramento, was visited in May 1998 by Demetria Carter. While in the prison visitation room, Carter got up and used the restroom. When she returned, Carter pulled a bag of plain "M&M's" candy from her pants. Defendant picked up the bag of candy, tore it open with his teeth, and emptied some of the contents into his mouth. He then drank from a carton of milk and swallowed without chewing. He repeated this process several times.

A correctional officer who was conducting video surveillance of the visit testified that Carter did not purchase the M&M bag at the nearby vending machines and, thus, the officer believed that defendant was swallowing contraband rather than candy.

The officer continued surveillance through the end of the visit. Thereafter, defendant was put on body cavity surveillance. A few days later, he defecated 15 round plastic-wrapped bindles. Laboratory testing revealed that the bindles contained 28.77 grams of marijuana, a useable amount.

DISCUSSION

I

Defendant contends that the trial court should not have given CALJIC No. 17.41.1 because, in his view, it impermissibly intruded

into the secrecy and autonomy of the jury deliberations, thereby depriving him of his constitutional right to an impartial jury.[1]

The contention fails for the reasons stated in *People v. Engelman* (2002) 28 Cal.4th 436, at pages 441-445, a decision which, as defendant acknowledges, is binding on this court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

II

Next, defendant complains about the giving of CALJIC No. 1.00. According to defendant, by telling the jurors that they must not infer from his arrest or the fact he was charged and brought to trial that he "is more likely to be guilty than not guilty," the court impermissibly lessened the prosecutor's burden to prove guilt beyond a reasonable doubt.[2]

The contention fails for the reasons stated in *People v. Wade* (1995) 39 Cal.App.4th 1487, at page 1492: "[T]he jury would not have construed the instruction in the manner suggested by

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[1] The court instructed with CALJIC No. 17.41.1 as follows: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or express[es] an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of that situation."

[2] The court instructed with CALJIC No. 1.00 in pertinent part as follows: "You must not be biased against the defendant because he's been arrested for this offense, charged with a crime or brought to trial. None of these circumstances is evidence of guilt and you must not infer or assume from any or all of them that the defendant is more likely to be guilty than not guilty."

defendant. A reasonable juror would understand this instruction as an advisement to disregard the facts that defendant had been arrested, charged, and brought to trial, and to presume the defendant innocent. 'Constitutional jurisprudence has long recognized [instruction on the presumption of innocence] as one way of impressing upon the jury the importance of the right to have one's guilt "determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial. . . ." [Citation.]' [Citations.] [¶] Moreover, the jurors were clearly and fully instructed on the burden of proof [beyond a reasonable doubt]. . . . [¶] The jury was also told to '[c]onsider the instructions as a whole and each in light of all the others.' [¶] [D]efendant has failed to show any error in the giving of CALJIC No. 1.00."

Defendant's attempt to distinguish this case from *People v. Wade, supra,* based on different versions of the reasonable doubt instruction is unconvincing because, regardless of the version of CALJIC No. 2.90 given, a reasonable jury would not have interpreted CALJIC No. 1.00 as defendant suggests.

Defendant argues that we should reconsider *People v. Wade, supra,* in light of *People v. Dail* (1943) 22 Cal.2d 642, overruled on other grounds in *People v. Cook* (1983) 33 Cal.3d 400, at page 413, footnote 13. We disagree. "Unlike the *Dail* case . . . , the jurors were not misled by the giving of one erroneous and one correct instruction covering the same subject." (*People v. Davenport* (1985) 41 Cal.3d 247, 272.) There was no error.

III

Defendant raises the well-worn, frivolous challenge to the 1994 revision of CALJIC No. 2.90, California's reasonable doubt instruction, arguing it "reduced the prosecution's burden of proof to something less than" the requisite standard of proof beyond a reasonable doubt.[3] Acknowledging that "[a]ll reported appellate cases have upheld the validity of CALJIC No. 2.90," his appellate counsel raises the issue anyway in the mistaken belief that "this Court has not yet resolved the issue." Either counsel plucked this short three-paragraph, generic argument from a word processor without any thought, or his research skills are woefully deficient. In 1999, this court published the decision in *People v. Hearon* (1999) 72 Cal.App.4th 1285, holding that an identical attack on CALJIC No. 2.90 has been "conclusively settled adversely to defendant's position," and urging "appellate attorneys to take this frivolous contention off their menus." (*Id.* at p. 1287.)

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[3] The court instructed with CALJIC No. 2.90 as follows: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt. [¶] Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."

IV

Defendant faults his trial attorney for failing to raise a claim at sentencing that defendant's prison term of 25 years to life as a "three strikes" recidivist constitutes cruel or unusual punishment within the meaning of article I, section 17, of the California Constitution and the Eighth Amendment to the United States Constitution.

But trial counsel is not required to "advance meritless arguments or to undertake useless procedural challenges merely to create a record impregnable to assault for claimed inadequacy of counsel." (*People v. Constancio* (1974) 42 Cal.App.3d 533, 546.) As we will explain, trial counsel undoubtedly understood that a cruel and unusual punishment argument lacks merit and would have been futile.

"[A] punishment may violate [the California Constitution] if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted (hereafter *Lynch*.) Courts use three techniques to administer this rule: examination of the nature of the offense and the offender (*id.* at p. 425); comparison of the punishment with the penalty for more serious crimes in the same jurisdiction (*id.* at p. 426); and comparison of the punishment to the penalty for the same offense in different jurisdictions (*id.* at p. 427).

Regarding the offense and the offender, defendant claims that his crime "is a minor one" in which "no one was injured" and argues

that it is "bizarre" and "cruelly ironic" that he has received the same life sentence for murder at age 18 and possession of marijuana at age 29.

However, the felony possession of marijuana by a state prison inmate is hardly a minor offense. Rather, it is one that has the potential to seriously jeopardize institutional security. (*Estes v. Rowland* (1993) 14 Cal.App.4th 508, 538-539 ["smuggling of contraband into California's prisons is a grave problem"]; see *People v. Harris* (2000) 83 Cal.App.4th 371, 376.)

And the irony of defendant's sentence arises from his decision to reoffend following his convictions in 1991 for murder, burglary, and attempted robbery after he grabbed malt liquor from a mini-mart and then shot the clerk in the heart with a .38-caliber handgun as defendant and a companion fled from the scene. Defendant was serving 30 years to life for those crimes when he committed the present offense.

Defendant's criminal history shows that he became a habitual, violent offender at a young age.

He was 17 years old in April 1990, when he and a companion demanded money from a "male victim, then pulled the victim's $200 ski jacket off his person and fled."

He was 17 years old in September 1990, when he "entered his school nurse's office, removed $50 in cash and several credit cards from her purse, then wrote gang graffiti on the bathroom wall in the nurse's office."

He was 17 years old in March 1991, when he attempted to escape from officers after he and four companions surrounded a person,

punched him in the face and kicked him, and took a videocassette from him.

He was 18 years old in November 1991, when he committed the burglary, attempted robbery, and senseless murder of the store clerk by shooting him in the heart.

And the following month, December 1991, he and a companion "performed a drive-by shooting in which . . . defendant fired a sawed-off shotgun at two pedestrians, striking one of [them] with 10 to 14 pellets." Charges against defendant for this offense were dismissed after he was convicted and sent to prison for murdering the store clerk.

The present offense demonstrates once again that defendant refuses to abide by the law, even when he is in a prison setting, and that he presents a continuing danger to public safety.

In comparing his sentence to the terms in California for murder and crimes involving great bodily injury, defendant ignores that he is not being punished "merely on the basis of his current offense but on the basis of his recidivist behavior." (*People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1136-1137.) As noted in *People v. Mantanez* (2002) 98 Cal.App.4th 354, "'The basic fallacy of [defendant's] argument lies in his failure to acknowledge that he "is not subject to a life sentence merely on the basis of his current offense but on the basis of his recidivist behavior. Recidivism in the commission of multiple felonies poses a manifest danger to society[,] justifying the imposition of longer sentences

for subsequent offenses. [Citations.]" [Citation.]'" (*Id.* at p. 366, quoting *People v. Stone* (1999) 75 Cal.App.4th 707, 715.)

Defendant claims his sentence is "totally out of line with the sentence [he] would receive in every other jurisdiction." But the fact "California's punishment scheme is among the most extreme does not compel the conclusion that it is unconstitutionally cruel or unusual. This state constitutional consideration does not require California to march in lockstep with other states in fashioning a penal code. It does not require 'conforming our Penal Code to the "majority rule" or the least common denominator of penalties nationwide.' [Citation.] Otherwise, California could never take the toughest stance against repeat offenders or any other type of criminal conduct." (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1516; see *People v. Romero* (2002) 99 Cal.App.4th 1418, 1433.)

Considering the nature of his felony and the nature of his history as a recidivist offender, and comparing his sentence to terms imposed for other crimes in California and to terms imposed in other jurisdictions, defendant's sentence of 25 years to life does not shock the conscience or offend fundamental notions of human dignity. (*Lynch, supra*, 8 Cal.3d at p. 424.)

Defendant's argument also fails with respect to the Eighth Amendment of the United States Constitution.

"When the California Legislature enacted the three strikes law, it made a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime. Nothing in the Eighth Amendment prohibits California from making that choice. To the

contrary, . . . 'States have a valid interest in deterring and segregating habitual criminals.'" (*Ewing v. California* (2003) 538 U.S. __ [155 L.Ed.2d 108, 120] (lead opn. of O'Connor, J.).) "Recidivism is a serious public safety concern in California and throughout the Nation" (*ibid.*) and "has long been recognized as a legitimate basis for increased punishment." (*Ibid.*) Thus, the "State of California has a reasonable basis for believing that dramatically enhanced sentences for habitual felons 'advance[s] the goals of [its] criminal justice system in a[] substantial way'" (*id.* at p. ___ [155 L.Ed.2d at pp. 121-122]) to deter repeat offenders and protect the public by, at some point, segregating repeat felons from the rest of society for extended periods of time. (*Id.* at p. ___ [155 L.Ed.2d at p. 121].)

"'The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime.'" (*Ewing v. California, supra,* 538 U.S. at p. __ [155 L.Ed.2d at pp. 119, 127] (lead opn. of O'Connor, J., & dis. opn. of Breyer, J.).)

Defendant, an inmate in state prison, was convicted of the felony offense of possessing marijuana in prison after he secreted the drug by swallowing 15 bindles of marijuana a visitor brought to him. "In weighing the gravity of [defendant's crime,] we must place on the scales not only his current felony, but also his long history of felony recidivism. Any other approach would fail to accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions." (*Ewing v. California, supra,* 538 U.S. at p. __ [155 L.Ed.2d at p. 122].)

Just like Ewing's three strikes sentence of 25 years to life for grand theft of golf clubs, defendant's three strikes sentence of 25 years to life for possessing marijuana in state prison was "justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record." (*Ewing v. California, supra,* 538 U.S. __ [155 L.Ed.2d at p. 123].) Defendant's current felony is more serious than Ewing's latest felony because it occurred in state prison and implicated the correctional goal of institutional security. (*People v. Harris, supra,* 83 Cal.App.4th at p. 376.) And defendant's criminal history is more egregious than Ewing's because it includes a conviction of first degree murder. (*Ewing v. California, supra*, 538 U.S. at p. __ [155 L.Ed.2d at pp. 115-116].)

Because defendant's prison term does not constitute cruel or unusual punishment, his trial counsel was not ineffective for failing to raise the point at sentencing.

DISPOSITION

The judgment is affirmed.

SCOTLAND, P.J.

We concur:

SIMS, J.

DAVIS, J.